No. 88-602

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALLIED CHEMICAL, an operating unit of Allied Corporation,

Petitioner,

—v.—

NIAGARA MOHAWK POWER CORPORATION and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

NIAGARA MOHAWK POWER CORPORATION BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the unfounded allegation that this case presents a federal question implicating the Public Utility Regulatory Policies Act of 1978 ("PURPA") is sufficient to warrant a grant of certiorari where petitioner was held to be collaterally estopped under State law from attacking a State administrative agency ruling and where petitioner failed to raise its federal objection in the proper State forum below?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
A. The Enactment of PURPA and Regulations of the Federal Energy Regulatory Commission	2
B. The Commission's Implementation of PURPA Provisions	4
C. The Niagara Mohawk-Allied Power Purchase Contract	4
D. Niagara Mohawk's Avoided Cost Tariff and the Commission's Ruling	5
E. Allied's Failure to Appeal and Subsequent Collateral Attack	6
F. The Proceedings Before the Courts of the State of New York	7
REASONS WHY THE PETITION SHOULD BE DENIED	8
1. No Federal Question Has Been Presented In This Case	8
2. Allied Fails To Raise A Question Of Sufficient Importance To Warrant Review By This Court Because The Commission Acted In A Manner Entirely Consistent With PURPA	11

PAGE

CONCLUSION 14

APPENDICES

A. Agreement Between Allied Chemical And Niagara Mohawk Power Corporation Dated October 1, 1981..... A-1

B. Petition of Niagara Mohawk Power Corporation To The Public Service Commission Of The State Of New York For A Declaratory Ruling Filed On April 5, 1984. ..... B-1

C. Allied Chemical's Counterpetition To Niagara Mohawk's Petition For A Declaratory Ruling Filed On June 19, 1984..... C-1

TABLE OF AUTHORITIES

Cases	PAGE
Allied Chemical v. Niagara Mohawk Power Corp., 129 A.D.2d 233, 517 N.Y.S.2d 635 (4th Dep't), *appeal granted*, 70 N.Y.2d 611, 523 N.Y.S.2d 495 (1987) ...	8
Allied Chemical v. Niagara Mohawk Power Corp., 72 N.Y.2d 271, 532 N.Y.S.2d 230 (1988)	8, 9
American Paper Institute v. American Electric Power Service Corp., 461 U.S. 402 (1983).....	2, 12
American Surety Co. v. Baldwin, 287 U.S. 156 (1932)..	10
Beck v. Washington, 369 U.S. 541 (1962).....	10
Campo v. New York City Employees' Retirement System, 843 F.2d 96 (2d Cir.), *cert. denied*, 57 U.S.L.W. 3259 (1988)	10
Commonwealth of Pennsylvania v. Brown, 260 F. Supp. 323 (E.D. Pa. 1966), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968)	9
Consolidated Edison Co. of New York, Inc. v. Public Service Commission, 63 N.Y.2d 424, 483 N.Y.S.2d 153 (1984), *appeal dismissed*, 470 U.S. 1075 (1985)	10
Crowell v. Randell, 35 U.S. 368 (1836)	10
Equitable Life Assur. Society v. Brown, 187 U.S. 308 (1902)	9
Exxon Corp. v. Eagerton, 462 U.S. 176 (1983)	11
FERC v. Mississippi, 456 U.S. 742 (1982)	2
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	11

PAGE

Godchaux Co., Inc. v. Estopinal, 251 U.S. 179 (1919) . 10

Hines v. Davidowitz, 312 U.S. 52 (1941)..... 11

Howat v. Kansas, 258 U.S. 181 (1922) 11

Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975)..... 10

Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U.S. 4 (1939)..... 9

Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952) 9

Porter v. Nossen, 360 F. Supp. 527 (M.D. Pa. 1973), *aff'd*, 511 F.2d 1395 (3d Cir.), *cert. denied*, 423 U.S. 930 (1975) 9

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955)..... 9

Ross v. Moffitt, 417 U.S. 600 (1974)..... 8

Sugarman v. United States, 249 U.S. 182 (1919)..... 9

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924)..... 9

Waybright v. Columbian Mut. Life Ins. Co., 122 F.2d 245 (6th Cir. 1941)..... 9

Yellow Cab Co. v. Price, 50 F. Supp. 730 (N.D. Ill. 1943) 9

Zucht v. King, 260 U.S. 174 (1922) 9

Administrative Decisions

Case 27824, *Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, 21 N.Y.P.S.C. 66 (Order Implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978, issued Jan. 7, 1981)..... 4

PAGE

Case 27574, *Consolidated Edison Co. of New York, Inc.*, 22 N.Y.P.S.C. 1858 (Opinion and Order Establishing Rates, Charges, Rules and Regulations for Electric Service Provided to Customers With On-Site Generation, Opinion No. 82-10 issued May 12, 1982) 5

Statutes

Public Utility Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3144 ..... *passim*

16 U.S.C. § 796(18) 2

16 U.S.C. § 796(18)(A) 2

16 U.S.C. § 824a-3 ..... 2, 11

16 U.S.C. § 824a-3(a) 13

16 U.S.C. § 824a-3(d) 2

16 U.S.C. § 2601 *et seq.* 2

28 U.S.C. § 1257(3) 8

N.Y. Civ. Prac. L. & R. Art. 78 (McKinney 1981 and Supp. 1988) ..... *passim*

N.Y. Civ. Prac. L. & R. § 7801 10

Administrative Materials

18 C.F.R. Part 292 (1988) 2, 11

18 C.F.R. § 292.304 (1988) 2

18 C.F.R. § 292.304(b) (1988) 3

18 C.F.R. § 292.304(b)(1) (1988) 3

18 C.F.R. § 292.304 (b)(2) (1988) 12

18 C.F.R. § 292.304(b)(3) (1988) 3, 12, 13

PAGE

Court Rules

Sup. Ct. R. 15(1)(e) 9

Sup. Ct. R. 16(1)(b) 9

Sup. Ct. R. 17 8

Sup. Ct. R. 17(1)(a) 9

Other Authorities

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12214 (Feb. 25, 1980) 3, 13

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NIAGARA MOHAWK POWER CORPORATION BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Niagara Mohawk Power Corporation[1] ("Niagara Mohawk" or the "Company") respectfully requests that this Court deny the subject petition for writ of certiorari, seek-

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1 As required by Rule 28.1 of this Court, the following information as to entities that may be considered, for the disclosure purposes of such rule, to be subsidiaries or affiliates of Niagara Mohawk Power Corporation is supplied: Opinac Investments, Ltd.; Opinac Energy, Ltd.; Canadian Niagara Power Company, Ltd.; Opinac Holdings, Ltd.; N.M. Uranium, Inc.; HYDRA-CO Enterprises, Inc.; Beebee Island Corporation; Moreau Manufacturing Corporation; NITECH, Inc.; and Curtis-Palmer Hydroelectric Company.

ing review of the order and opinion of the Court of Appeals of the State of New York.

STATEMENT OF THE CASE

Niagara Mohawk is a New York gas and electric corporation subject to the jurisdiction of the Public Service Commission of the State of New York (the "Commission").

Petitioner Allied Chemical ("Allied") owns and operates "qualifying" cogeneration facilities in conjunction with its manufacturing plants in the Town of Geddes, New York (the "Geddes Facility"). *See* Petition for Writ of Certiorari, p. 3; *see also* 16 U.S.C. § 796(18); *see generally* 16 U.S.C. §§ 2601 *et seq.*

A. The Enactment of PURPA and Regulations of the Federal Energy Regulatory Commission

Congress enacted PURPA on November 9, 1978, as one element of a comprehensive National Energy Act. Pub. L. 95-617, 92 Stat. 3144; *see FERC v. Mississippi*, 456 U.S. 742 (1982); *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983). In accord with the legislative mandate directing that it promulgate regulations encouraging the development of alternative energy sources,[2] the Federal Energy Regulatory Commission ("FERC") developed the regulatory scheme now codified at Title 18, Part 292 of the Code of Federal Regulations. *See* 18 C.F.R. Part 292 (1988). Those regulations required electric utilities, *inter alia*, to purchase electric energy from the owners of certain alternative energy sources—*e.g.*, "qualifying" cogeneration facilities—at rates based on "avoided costs"—*i.e.*, the costs to an electric utility of electric energy which, but for its purchase from a cogenerator, the electric utility would generate or purchase from another source. *See* 18 C.F.R. § 292.304; 16 U.S.C. § 824a-3(d); *see also* 16 U.S.C. § 796(18)(A).

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2 *See* 16 U.S.C. § 824a-3(a).

The regulations further defined the term "qualifying facility" so as to distinguish "old capacity" constructed prior to the effective date of PURPA from "new capacity" cogeneration facilities for purposes of an electric utility's obligation to purchase cogenerated power. FERC permitted State regulatory authorities, like the Commission, to set rates for the purchase of electric energy generated by "old capacity" at a rate lower than the electric utility's full avoided costs "if the State regulatory authority . . . determines that the lower rate will provide sufficient encouragement of cogeneration. . . ." *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12214, 12223 (Feb. 25, 1980). FERC explained that

> [t]he limitation contained in the proposed rule was intended to prevent a cogenerator . . . which had found it economical to produce power for its own consumption prior to the issuance of these rules, from receiving the economic rent that might result from the purchase of its entire output at a utility's full avoided cost after that date without new investment on the part of the qualifying facility.

Id.

The regulations, therefore, permit the rate paid for the purchased electric energy to vary, depending upon the date upon which construction of the alternative energy source commenced. *See* 18 C.F.R. § 292.304(b). If the alternative energy source was constructed before November 9, 1978, it is characterized as an "old capacity" facility; if the source was constructed on or after that date, it is characterized as a "new capacity" facility. *See* 18 C.F.R. § 292.304(b)(1) and (3). The oldest unit at the Geddes Facility was constructed and placed in operation in 1942; the newest unit, in 1965. Accordingly, the Geddes Facility is properly characterized as an "old capacity" facility for which the Commission may, consistent with FERC regulations, establish a purchase rate at less than "avoided costs."

B. The Commission's Implementation of PURPA Provisions

On January 7, 1981, the Commission issued an order and rules implementing certain provisions of PURPA. Case 27824, *Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, 21 N.Y.P.S.C. 66 (Order Implementing Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978, issued Jan. 7, 1981). The Commission's Order directed that, *inter alia*, electric utilities entering into purchase arrangements for electric energy generated by alternative sources include a contract provision which would allow either party to substitute an "applicable" rate for the "contract" rate (a "Substitution Clause"). The substituted "applicable" rate could be either that stated in a general tariff approved by the Commission or that ordered by the Commission on petition by either contracting party.

C. The Niagara Mohawk-Allied Power Purchase Contract

On or about October 1, 1981, Niagara Mohawk entered into a contract with Allied for the purchase of power generated at the Geddes Facility (the "Contract").[3] The contract rate to be paid Allied was fixed at the Company's average cost of fossil fuel per kilowatt hour of electrical production (the "Contract Rate"). In compliance with the Commission's directive, the Contract included the following Substitution Clause at Article FIFTH (attached hereto as Appendix A):

> It is further provided that either party may elect to replace the price for energy as specified above with an *applicable* rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT.

Appendix A-3 (emphasis added). On November 16, 1981, Allied and Niagara Mohawk filed the Contract with the Commission for its approval.

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3 *See* Petition for Writ of Certiorari, p. 3.

D. Niagara Mohawk's Avoided Cost Tariff and the Commission's Ruling

On May 12, 1982, in Case 27574, *Consolidated Edison Co. of New York, Inc.*,[4] the Commission directed the State's electric utilities to file tariff leaves containing a purchase rate based upon full avoided costs.[5] At no point did the Commission indicate that the new tariff leaves were intended to replace existing contractual rates for "old capacity" facilities.

Niagara Mohawk filed its Service Classification Number 6 ("S.C. 6") tariff leaves with the Commission pursuant to the order in Case 27574 on January 31, 1984. On March 20, 1984, Allied presented Niagara Mohawk with a demand for the S.C. 6 tariff rate, claiming that the newly implemented S.C. 6 tariff rate was an "applicable" rate within the meaning of the Contract which could be substituted for the Contract Rate. Niagara Mohawk rejected Allied's demand, and, by petition dated April 5, 1984, requested that the Commission determine whether the S.C. 6 tariff leaves were an "applicable" rate which could be substituted for the Contract Rate. By counterpetition and complaint dated June 19, 1984, Allied also sought affirmative relief in the form of a resolution of the contractual dispute.[6] In the

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4 Case 27574, *Consolidated Edison Co. of New York, Inc.*, 22 N.Y.P.S.C. 1858 (Opinion and Order Establishing Rates, Charges, Rules and Regulations for Electric Service Provided to Customers With On-Site Generation, Opinion No. 82-10, issued May 12, 1982).

5 *See id.* at 2003.

6 The petition and counterpetition before the Commission contain precise statements of the relief sought by both Niagara Mohawk *and* Allied. For example, in the "Petition of Niagara Mohawk Power Corporation to the Public Service Commission of the State of New York for a Declaratory Ruling" (attached hereto as Appendix B), the Company requested that the Commission issue:

> a declaratory ruling indicating whether Niagara Mohawk's current tariff SC-6 [the S.C. 6 Rate], incorporating payment at full-avoided cost, is the tariff envisioned for use in the Commission's order of

interim, Niagara Mohawk continued to pay Allied at the Contract Rate.

On January 22, 1985, the Commission issued its decision, finding that the S.C. 6 tariff leaves are not applicable to electric energy generated at the Geddes Facility. The Commission emphasized that the federal regulations distinguish "old" and "new" capacity facilities and determined that, as "old capacity," the Geddes Facility is not entitled to the Company's S.C. 6 tariff rate. *See generally* "Public Service Commission of the State of New York Ruling with Respect to the Niagara Mohawk-Allied Dispute and Proposed Policy Statement Applicable to Qualifying Facilities that Provide Old Capacity" (issued Jan. 22, 1985).[7]

E. Allied's Failure to Appeal and Subsequent Collateral Attack

The Commission's ruling with regard to the contractual dispute between Allied and Niagara Mohawk was final upon issuance. Neither party filed an application for rehearing or sought judicial review within the applicable four-month limitation

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January 7, 1981 as payment for energy purchased from a facility, like Allied's, on which construction has begun prior to November 9, 1978. If it is not, under what criteria should the Company pay for such electricity purchased from Allied on a particular basis and, on a general basis, other similarly situated facilities?

Appendix B-6.

In Allied's "Counterpetition" (attached hereto as Appendix C), Allied requested "a declaratory ruling from the Commission requiring Niagara Mohawk to purchase power from Allied's cogeneration facility at the filed rate of SC 6 [the S.C. 6 Rate]. . . ." Appendix C-6.

7 In announcing its decision with regard to the respective rights of Allied and Niagara Mohawk, the Commission also instituted a generic proceeding, through means of a proposed policy statement, to determine whether qualifying facilities that provide "old capacity" would be entitled to rates approaching full avoided costs. The proposed policy statement provided for a prospective rate phase-in procedure applicable to all "old capacity" facilities. *See* Petitioner's Appendix F-1.

A final policy statement, applicable to the Geddes Facility, formally adopted a ten-year phase-in of full avoided costs for old capacity cogenerators. *See* Petitioner's Appendix G.

period specified by New York law. *See* N.Y. Civ. Prac. L. & R. Art. 78 (McKinney 1981 and Supp. 1988).

On January 27, 1986, Allied again presented Niagara Mohawk with a demand for payment at the S.C. 6 tariff rate covering the period between March 20, 1984—the date on which Allied advised the Company that it would exercise its option to be paid at the S.C. 6 Rate—and December 2, 1985. Following the Company's rejection of the second demand, Allied began a collateral attack on the Commission's decision by means of a breach of contract action in the courts of the State of New York.[8]

F. The Proceedings Before the Courts of the State of New York

The Supreme Court of the State of New York, Onondaga County, granted both Niagara Mohawk's motion to dismiss the Amended Complaint, and the Commission's motion for summary judgment, on the grounds that (1) the parties' dispute had been resolved in a quasi-judicial procedure by the Commission, and (2) Allied's challenge to the Commission's decision, cloaked in the guise of a breach of contract action, is time-barred by New York law. *See* Petitioner's Appendix E.

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8 In lieu of an answer, the Company moved to dismiss the complaint on the grounds that, *inter alia*, the issue of tariff applicability had been litigated and finally decided by the Commission in its January 22, 1985 decision. In a bench ruling announced at the close of oral argument, the trial court ordered Allied to amend its complaint to name the Commission as a party defendant. In ordering the amendment, the court indicated that it wished to hear the Commission's views regarding the purpose and intent of the January 22 decision.

Allied served a Supplemental Summons and Amended Complaint on July 30, 1986, adding the Commission as a party defendant. The Amended Complaint sought no relief from the Commission. On August 18, 1986, the Commission answered, and moved for summary judgment on September 5, 1986. In its answer and pleadings, the Commission confirmed Niagara Mohawk's understanding of the January 22 decision, joining in the Company's argument that Allied's action is barred by the doctrine of *res judicata* and the applicable statute of limitations.

On appeal, the Supreme Court of the State of New York, Appellate Division, Fourth Department, unanimously affirmed the trial court's order dismissing the Amended Complaint, and held "that the manner in which the Allied Chemical-[Niagara Mohawk] dispute was resolved was adjudicatory in nature and that collateral estoppel should apply." *Allied Chemical v. Niagara Mohawk Power Corp.*, 129 A.D.2d 233, 235, 517 N.Y.S.2d 635, 637 (4th Dep't), *appeal granted*, 70 N.Y.2d 611, 523 N.Y.S.2d 495 (1987).

Finally, on appeal to the Court of Appeals of the State of New York, a unanimous panel affirmed the order below, holding that the doctrines of *res judicata* and collateral estoppel bar Allied's attempt to relitigate the lawfulness of the Commission's ruling. *See Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 532 N.Y.S.2d 230 (1988).

REASONS WHY THE PETITION SHOULD BE DENIED

1. No Federal Question Has Been Presented In This Case.

Allied purports to invoke this Court's jurisdiction pursuant to the provisions of Title 28, Section 1257(3) of the United States Code. 28 U.S.C. § 1257(3);[9] *Ross v. Moffitt*, 417 U.S. 600, 617 (1974). The statute requires that to invoke the jurisdiction of this Court, a case must present a question of federal law. The Rules of this Court further suggest that the federal question raised must be substantial. Sup. Ct. R. 17. Mere reference to a federal statute in a State court decision otherwise entirely devoted to the resolution of a question of State law cannot per-

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9 Section 1257(3) (28 U.S.C. § 1257(3)) provides in relevant part that:

> [f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . .:
>
> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question . . . or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

mit review. Here, no question of federal law exists and no federal statute is drawn into question.

Thus, petitioner fails to satisfy the jurisdictional requirements of this Court and the petition seeking the grant of a writ of certiorari to the Court of Appeals of the State of New York must be denied. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1955); *see Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952); *Equitable Life Assur. Society v. Brown*, 187 U.S. 308 (1902); *Zucht v. King*, 260 U.S. 174, 176 (1922); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 455 (1924); *Sugarman v. United States*, 249 U.S. 182, 184 (1919); Sup. Ct. R. 17(1)(a); *see also* Sup. Ct. R. 15(1)(e); Sup. Ct. R. 16(1)(b).

The unanimous decisions of three state courts, including the Court of Appeals, rest solely upon State law. The controlling issue is undeniably nonfederal in character, a question of New York procedural and administrative law—*i.e.*, whether the contractual dispute between Allied and Niagara Mohawk was fully, fairly and conclusively litigated by the parties, at their request, in a quasi-judicial proceeding before the Commission. *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d at 274, 532 N.Y.S.2d at 231. Any fair reading of the decision below establishes that the decision below explicitly and exclusively resolved the State law issue of whether Allied's breach of contract action is barred by the doctrines of *res judicata* and collateral estoppel.[10]

Moreover, Allied failed to raise, present, or pursue its federal claim in a timely and proper manner at the appropriate point in

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10 It is well-settled that the question of applicability of the doctrine of *res judicata* to a State administrative agency determination is one of State law, not subject to review in this Court. *See Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 7-8, 11 (1939); *see Waybright v. Columbian Mut. Life Ins. Co.*, 122 F.2d 245, 247 (6th Cir. 1941); *Porter v. Nossen*, 360 F. Supp. 527, 529 (M.D. Pa. 1973), *aff'd*, 511 F.2d 1395 (3d Cir.), *cert. denied*, 423 U.S. 930 (1975); *Commonwealth of Pennsylvania v. Brown*, 260 F. Supp. 323, 340 (E.D. Pa. 1966), *aff'd*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968); *Yellow Cab Co. v. Price*, 50 F. Supp. 730, 733 (N.D. Ill. 1943).

the State forum. *See Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *see also Crowell v. Randell*, 35 U.S. 368, 391 (1836) ("If both of these [the raising and deciding of the federal question] do not appear on the record, the appellate jurisdiction fails"). If Allied believed the Commission to have acted beyond the scope of its jurisdiction its proper remedy was to bring an article 78 proceeding pursuant to Section 7801 of the New York Civil Procedure Law and Rules. *See* N.Y. Civ. Prac. L. & R. § 7801. Under New York law, article 78 "provides the mechanism for challenging a specific decision of a state administrative agency." *Campo v. New York City Employees' Retirement System*, 843 F.2d 96, 101 (2d Cir. 1988), *cert. denied*, 57 U.S.L.W. 3259 (1988), *appeal pending* (citations omitted); *Consolidated Edison Co. of New York, Inc. v. Public Service Commission*, 63 N.Y.2d 424, 483 N.Y.S.2d 153 (1984), *appeal dismissed*, 470 U.S. 1075 (1985); *see also Lombard v. Board of Education of the City of New York*, 502 F.2d 631, 636 (2d Cir. 1974), *cert. denied*, 420 U.S. 976 (1975) ("It seems clear enough that if the appellant actually failed to assert his constitutional claim in the state court, he could not get a writ of certiorari from the nonconstitutional judgment of the state court").[11]

Allied, however, having missed the four month statute of limitations governing article 78 actions, failed to follow the prescribed statutory scheme for seeking review of administrative decisions and instead brought a breach of contract action in which it argued that its action was not related to the Commis-

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11 Assuming *arguendo*, that the Commission erred in some manner, the appropriate avenue for redress of Allied's grievance was, as the Court of Appeals of the State of New York found, an article 78 proceeding brought pursuant to the New York Civil Practice Law and Rules—a remedy Allied never sought. Through its failure to abide by the State's prescribed appellate procedures, Allied thereby waived its right to review in this Court. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 169 n.6 (1932) (Court dismissed a writ of certiorari where petitioner had moved to vacate a state court judgment instead of appealing directly to the state supreme court saying: "The cases are many in which failure to comply with state rules of practice has prevented this Court from considering a federal claim on direct review") (citations omitted).

sion's decision and that the Commission should not be joined as a party to the action: "The issue presented by Allied in its Complaint is a purely contractual issue. . . . [T]he [Commission] has no recognizable interest in this proceeding which might be inequitably affected by a judgment in the action." *See* Petitioner's Appendix J-10.

An improper choice of remedy precludes review where the decision of the State administrative agency is attacked in collateral proceedings and not directly appealed. *Howat v. Kansas*, 258 U.S. 181 (1922). Allied collaterally attacked the Commission's decision in a breach of contract action instead of appealing it directly in a timely article 78 proceeding. Allied cannot now reverse field and attack the Commission's determination (and necessarily, its jurisdiction) directly. This Court should not sanction such inconsistency.

2. Allied Fails To Raise A Question Of Sufficient Importance To Warrant Review By This Court Because The Commission Acted In A Manner Entirely Consistent With PURPA.

Allied argues that the Commission somehow "redefined" PURPA and that the Commission's action was therefore preempted by the federal scheme. The Commission did nothing of the sort. Allied's effort necessarily must fail because the applicable provisions of PURPA and its implementing regulations establish beyond a shadow of a doubt that the Commission, in resolving Allied's contract-based dispute with Niagara Mohawk, acted squarely within its *expressly* delegated PURPA authority. *See* 16 U.S.C. § 824a-3; 18 C.F.R. Part 292 (1988). It is well settled that State action is only preempted by federal law to the extent that it actually conflicts with federal law. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983). Conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or when State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Commission's ruling neither interferes with compliance with State and federal regulations

nor does it in any way constitute an obstacle to the accomplishment of the full purposes and objectives of PURPA.[12]

Allied concedes that the Geddes Facility was constructed prior to the enactment of PURPA. Under FERC's regulations, the Geddes Facility is, therefore a qualifying facility selling old capacity—*i.e.*, capacity "other than new capacity." The federal regulation explicitly governing rates for purchases from old capacity qualifying facilities is Section 292.304(b)(3) of the Code of Federal Regulations. 18 C.F.R. § 292.304(b)(3) (1988). That regulation specifically authorizes a state regulatory agency to establish rates for an electric utility's purchases of electric energy from the old capacity of a qualifying facility at "less than the avoided cost." Under the express terms of Section 292.304(b)(3), therefore, the Commission was authorized to set rates for the Geddes Facility at less than Niagara Mohawk's avoided costs.

It is only by ignoring Section 292.304(b)(3) that Allied can demand entitlement to the full avoided cost rates to which only *new capacity* facilities are automatically entitled under Section 292.304(b)(2).[13] Allied compounds the confusion engendered by its improper reliance upon Section 292.304(b)(2) when it argues that this Court's decision in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983) supports the proposition that full avoided cost rates are mandatory for all qualifying facilities without distinction between old and new capacity facilities. *Id.* In fact, *American Paper Institute* merely upheld FERC's authority to set full avoided cost rates pursuant to subsection (b)(2) of Section 292.304 and made no reference whatever to subsection (b)(3). *See id.* at 406.

By unjustifiably asserting that it had an automatic entitlement to full avoided cost rates for its old capacity facility,

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12 Allied's citation to decisions of this Court and state courts of last resort for the principle that PURPA preempts inconsistent state regulation is completely inapposite because the Commission's action was entirely consistent with PURPA.

13 That this claim is selective is clear in view of the explicit provision in 18 C.F.R. § 292.304(b)(2) that makes paragraph (b)(2) "[s]ubject to paragraph (b)(3) of this section."

Allied seeks in effect to remove from the Commission the discretion to differentiate between old and new capacity qualifying facilities in setting rates for purchases from such facilities.[14] Since such discretion is explicitly delegated to state regulatory commissions pursuant to Section 292.304(b)(3), it is Allied—not the Commission—which seeks to contravene the federal scheme.

Far from being "preempted" by PURPA, the Commission's 1985 determination was a proper implementation of the explicit provisions of FERC's regulations. There was no inconsistency with PURPA and no attempt to "redefine" anything. Indeed, the Commission quite properly rejected Allied's demand for a rate to which it was not entitled.

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14 Pursuant to the implementing authority delegated to it under PURPA, FERC has decided that it is not essential to the accomplishment of PURPA's objectives to grant an automatic entitlement of full avoided cost rates to old capacity facilities. 16 U.S.C. § 824a-3(a). In fact, in promulgating 18 C.F.R. § 292.304(b)(3), FERC explicitly noted that a facility's existence prior to the enactment of PURPA "may indicate that appropriate economic returns were available without the further incentives provided by section 210." 45 Fed. Reg. at 12223. Thus, an old capacity facility cannot demand full avoided cost rates unless it demonstrates to the appropriate state regulatory authority "that it requires rates for purchases based on full avoided costs to remain viable, or to increase its output. . . ." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

John S. Kinzey*
Leon A. Allen, Jr.
Bert H. Ware

LEBOEUF, LAMB, LEIBY & MACRAE
Of Counsel
Attorneys for Respondent
Niagara Mohawk Power Corporation
520 Madison Avenue
New York, New York 10022
(212) 715-8000

*Counsel of Record

December 1, 1988

APPENDICES

This AGREEMENT, made and entered into as of the 1st day of October, 1981, by and between ALLIED CHEMICAL, an OPERATING UNIT of ALLIED CORPORATION, a domestic corporation (hereinafter referred to as ALLIED), with offices at Solvay, New York, and NIAGARA MOHAWK POWER CORPORATION, a domestic corporation (hereinafter referred to as NIAGARA) with its office and principal place of business at Syracuse, New York.

W I T N E S S E T H :

WHEREAS, ALLIED owns and operates an electric generating station and co-generation facility located in the Town of Geddes, New York, for use in the operation of its manufacturing plant in the Town of Geddes, New York, and

WHEREAS, said manufacturing plant's electrical system is so arranged that electric energy generated therein can be delivered to the electric transmission system of NIAGARA with which it is physically connected, and

WHEREAS, ALLIED is, from time to time, able to generate electric energy in excess of its requirements, and

WHEREAS, NIAGARA, in the conduct of its business, can make use of the electric energy which ALLIED may generate at its electric generating plant in excess of its own requirements and other obligations and which ALLIED can deliver to NIAGARA.

NOW, THEREFORE, in consideration of the premises and covenants hereinafter set forth, the parties hereto have agreed and do hereby mutually agree as follows:

FIRST: ALLIED shall deliver to NIAGARA and NIAGARA shall accept all the electric energy produced at ALLIED's said electric generating plant in excess of its own requirements and other obligations subject to the qualifications of Paragraphs SECOND and THIRD.

SECOND: NIAGARA's acceptance and obligation to pay for electric energy produced will be limited to those times when NIAGARA's

system is physically able to accept such energy and, if necessary for system integrity or safety, NIAGARA may order that ALLIED's generation be disconnected from NIAGARA's system. NIAGARA's orders and directions pursuant thereto shall be transmitted to and executed by the employees of ALLIED in charge of the maintenance and/or operation of the electric generating plant without delay. Further, NIAGARA expressly reserves its right to the extent specified in any pertinent state/federal regulatory pricing provisions.

THIRD: ALLIED shall deliver the electric energy to the system of NIAGARA at approximately 34,500 volts, 60 Hertz, 3 Phase over the electrical connections presently existing between the electrical systems of the two companies; provided, however, that ALLIED shall in no event be required to operate said electric generating plant or to make deliveries of energy to NIAGARA therefrom in such manner as to interfere with the normal operation of its said manufacturing plant or

the conduct of its business.

FOURTH: ALLIED shall have the right to shut down the operation of its said electric generating plant whenever and for such periods of time as it may elect.

FIFTH: NIAGARA shall pay ALLIED at its office in Solvay, New York on or before the twenty-fifth (25) day of each month for the electric energy delivered to the electric system of NIAGARA during the preceding calendar month.

The price to be paid by NIAGARA for the electric energy received from ALLIED shall be determined on the basis of "time of day" deliveries. Every month, on a basis consistent with its normal fuel adjustment procedures, NIAGARA will determine the average cost of fuel per kilowatt hour produced at NIAGARA's fossil fuel steam generating stations by (a) oil and natural gas, and (b) coal during the prior month. These costs will then be the basis for payments for energy produced in the subsequent

month.

Each month, NIAGARA will pay its average oil and natural gas price as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system between the hours of 8:00 AM and 10:00 PM, Mondays through Fridays, except for the following holidays when such holidays fall on other than a Saturday or a Sunday: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and Christmas Day. During all other hours, NIAGARA will pay its average coal price, as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system.

It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT.

SIXTH: If the existing electrical

connections referenced in Paragraph THIRD become inadequate to deliver ALLIED's excess electrical energy to the system of NIAGARA, then ALLIED shall reimburse NIAGARA for the costs associated with any necessary reinforcement, ALLIED shall have the option of paying NIAGARA the total cost of the reinforcement, or in the event ALLIED elects to pay the annual costs, such costs shall be recomputed as of January 1 of each year. ALLIED shall provide all necessary rights-of-way to permit the construction, operation and maintenance for any reinforcement.

SEVENTH: This AGREEMENT is for a term of ten (10) years with the right of either party, with the consent of the other, to renew this AGREEMENT under the same conditions for an additional term of ten (10) years, subject to the further provisions of Paragraph Eighth.

EIGHTH: If, after July 1, 1983, ALLIED proposes to separate its electric generating facilities from its manufacturing plant and to sell these electric generating facilities at

any time thereafter during the term of this AGREEMENT or any renewal or extension thereof, ALLIED shall first notify NIAGARA of its intention in writing. Following receipt of such notice, NIAGARA shall have the first option to negotiate the purchase of ALLIED's electric generating facilities over a ninety (90) day period, upon the expiration of which, if the purchase by NIAGARA has not then been negotiated, ALLIED may sell the electric generating facilities to others. It is expressly understood that ALLIED is currently negotiating for the sale of these electric generating facilities to a third party and that such negotiations shall be exempted from the provisions of this article EIGHTH and that NIAGARA shall have no options with respect to these negotiations, provided that such negotiations are concluded by June 30, 1983. Should a sale of Allied's electric generating facilities to a third party be consummated, then this agreement shall be terminated on the date of such sale. Allied shall notify

Niagara 30 days prior to the closing of such sale.

NINTH: Any conveyance made pursuant to Paragraph EIGHTH above shall be sufficient if made by warranty deed with ingress and egress to the property conveyed.

TENTH: Electric energy delivered by ALLIED hereunder shall be measured by electric watthour meters of a type approved by the New York State Public Service Commission, which meters shall be installed, owned and maintained by NIAGARA; however, the cost of the meter and the installation cost will be borne by ALLIED. On any day or days which a meter shall not be in service or shall be deemed to be defective, the quantity of electric energy delivered shall be determined in such manner as the parties shall agree. Each party shall have the right at all reasonable times, upon giving not less than four (4) days notice to the other party, to inspect and test said meters, and if found defective, NIAGARA shall adjust, repair or

replace the same at ALLIED's expense.

ELEVENTH: The duly authorized agent or agents of NIAGARA, shall, at all reasonable hours, have free access to the metering facilities associated with the delivery of electric energy to NIAGARA for the purpose of inspecting the records of such deliveries and/or reading and maintaining the meters.

TWELFTH: During the term of this AGREEMENT, NIAGARA, at its expense, shall have the right, easement and privilege to construct, operate, repair, maintain, remove and/or replace such electric transmission lines as it may reasonably require over and across the premises of ALLIED for the purpose of receiving and transmitting the electric energy herein provided to be delivered to NIAGARA, subject to the reasonable approval of ALLIED. Such approval may be withheld by ALLIED if the steps to be taken by NIAGARA relative to the construction, operation, repair, maintenance, removal and/or replacement of such electric transmission

lines would, in ALLIED's sole judgment, interfere with the normal operation of its said manufacturing plant or the conduct of its business.

THIRTEENTH: In the event of failure by NIAGARA to pay any amounts due to ALLIED as provided in Paragraph FIFTH above within a period of thirty (30) days subsequent to the due date, ALLIED shall have the right to suspend the deliver of energy to NIAGARA upon no less than seven (7) days prior written notice to NIAGARA of its intention to do so. If NIAGARA thereafter makes payment to ALLIED of all amounts due within a period of sixty (60) days from the date of suspension, such suspension shall be removed.

Any suspension of delivery caused by NIAGARA's failure to pay for a period of less than ninety (90) days shall not abrogate or modify any other provision of this AGREEMENT nor be held or construed as releasing either party hereto from its liability hereunder.

FOURTEENTH: Each party hereto

respectively assumes full responsibility in connection with the electric service supplied hereunder on each side of the point of delivery and for the wires, apparatus, devices and appurtenances used in connection therewith. Each party shall indemnify, save harmless and defend the other against all claims, demands, costs or expense for loss, damage or injury to person or persons or property in any manner directly or indirectly arising from, connected with or growing out of the generation, transmission or use of energy by it on its side of the point of delivery or for the operation of switching equipment in connection with said delivery, provided, however, that each party shall be liable for all claims of the party's own employees arising out of any provision of the Workers' Compensation Law.

FIFTEENTH: This AGREEMENT and the payments to be made hereunder shall not be assigned or transferred by either party without the prior written consent thereto of

the other party, which shall not be unreasonably withheld. Any assignment without the requisite consent shall be void.

SIXTEENTH: This AGREEMENT and all of its terms and conditions shall bind and enure to the benefit of the administrators, successors, grantees and assigns of the respective parties hereto.

SEVENTEENTH: This AGREEMENT is exclusive and contains all of the terms of the agreement between the parties and no change or variation in this AGREEMENT may be made except in express terms and by an instrument in writing signed by the parties hereto.

EIGHTEENTH: Niagara enters into this agreement with the express condition that both parties understand that the New York State Public Service Commission ("the Commission") has ordered Niagara to submit this agreement to the Commission for its review and possible modification or abrogation within sixty days of submittal. Both parties agree to abide by any orders the Commission may give in this

connection, and neither party will be liable or responsible to the other for any damages, costs or expenses (or losses thereof) arising out of such Commission review, modification, abrogation or approval.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed effective as of the day and year first above written.

ALLIED CHEMICAL, AN OPERATING UNIT OF ALLIED CORPORATION

By: /s/
H. J. N. Lalonde

Title: Director of Purchasing

Date: October 30, 1981

NIAGARA MOHAWK POWER CORPORATION

By: /s/
G. D. Garcy

Title: Power Contract Director

Date: November 2, 1981

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of

NIAGARA MOHAWK POWER CORPORATION

for a declaratory ruling from the New York Public Service Commission pursuant to Sections 20 and 66 of the Public Service Law and Section 204 of the State Administrative Procedures Act;

for a determination as to whether avoided cost is the appropriate price to be paid to qualifying facilities as that term is utilized in the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. Section 2601 et seq.) and Section 66-c of the Public Service Law of the State of New York;

for such facilities for which construction has commenced prior to November 9, 1978 ("old capacity")

TO THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK:

NIAGARA MOHAWK POWER CORPORATION

("Niagara Mohawk") or (the "Company") hereby petitions the New York State Public Service Commission (the "Commission") pursuant to New York State Public Service Law Sections 20 and 66 and the State Administrative Procedure Act

Section 204 to issue a declaratory ruling from the Commission with respect to the interpretation of the Commission's Order 82-10 in Case 27574 - Consolidated Edison Company of New York, Inc. - Electric Service Provided to Customers With On-Site Generation and its Order in Case 27824 - Proceeding Regarding Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978 with particular reference to the obligation of Niagara Mohawk to make payment for electricity purchased from qualifying facilities, construction of which commenced prior to November 9, 1978 ("old capacity").

In support of this petition, Niagara Mohawk respectfully alleges as follows:

1. Niagara Mohawk is a gas and electric corporation duly organized and existing under the laws of the State of New York having its principal office and place of business at 300 Erie Boulevard West, Syracuse, New York 13202. Its Certificate of Incorporation and amendments thereto have

heretofore been filed with the Commission in Case 12733. All other amendments to the Certificate of Incorporation have been filed in other numbered proceedings.

2. On November 9, 1978, the Public Utility Regulatory Policies Act (PURPA) 92 Stat. 3117, became effective which act provided, among other matters, that electric utility companies be obligated to purchase electricity from "qualifying facilities" as that term is defined in the statute and regulations adopted pursuant to the act by the United States Federal Energy Regulatory Commission (FERC).

3. On or about February 25, 1980, FERC published final regulations under Sections 201 and 210 of PURPA covering arrangements between electric utilities and qualifying facilities.[1]

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[1] Qualifying facilities is defined to mean a cogeneration facility or a small power production facility which meets the qualifying requirements under Sub-part B of the FERC regulations.

In pertinent part, electric utilities are required to purchase electricity generated by qualifying facilities. Section 292.304(b)(3) provides as follows:

> "A rate for purchase (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section, and is sufficient to encourage cogeneration and small power production."

4. The Commission, by an Order issued January 7, 1981 in Case 27824, required Niagara Mohawk as well as the other electric utilities under its jurisdiction, in pertinent part, as follows:

> "3. Any contract for the sale of energy or capacity to an electric utility by a qualifying small power production facility or a qualifying co-generation facility shall include a provision permitting the qualifying small power production facility or qualifying co-generation facility to elect to change the price for energy or capacity to the rate specified in applicable tariffs or rules when approved or adopted by the Commission."

5. On May 5, 1982 in Order 82-10 in

Case 27574, the Commission ordered Niagara Mohawk as well as the other electric utilities subject to its jurisdiction to pay avoided costs (Pg. 26) for the purchase of electricity from qualifying facilities. Specifically, the Commission ordered as follows:

> "4. Except as specified in Paragraph 3, each electric utility shall, within sixty days of the issuance of this Opinion and Order, submit proposed rates, charges, rules and regulations for the purchase of electric energy and capacity from customers with qualifying on-site generation facilities that are consistent with this Opinion and Order***."

6. On or about October 1, 1981, Niagara Mohawk entered into an agreement with Allied Chemical, an Operating Unit of Allied Corporation ("Allied") to purchase electricity from a cogeneration facility owned by Allied in the Town of Geddes, New York. A copy of said agreement was filed with the Commission on November 16, 1981. This agreement calls for payment by Niagara Mohawk to Allied under a pricing formula as follows:

"This price to be paid by NIAGARA

for the electric energy received from ALLIED shall be determined on the basis of "time of day" deliveries. Every month, on a basis consistent with its normal fuel adjustment procedures, NIAGARA will determine the average cost of fuel per kilowatt hour produced at NIAGARA's fossil fuel steam generating stations by (a) oil and natural gas, and (b) coal during the prior month. These costs will then be the basis for payments for energy produced in the subsequent month.

Each month, NIAGARA will pay its average oil and natural gas price as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system between the hors of 8:00 AM and 10:00 PM, Mondays through Fridays, except for the following holidays when such holidays fall on other than a Saturday or a Sunday: New Year's Day, Memorial Day,

Independence Day, Labor Day, Thanksgiving Day and Christmas Day. During all other hours, NIAGARA will pay its average coal price, as calculated by the above described method, for all energy delivered by ALLIED to NIAGARA's system."

This formula has resulted in recent payment to Allied at the following rates:

	(On Peak cents per KWH)	(Off Peak cents per KWH)
February 1984	4.9616	2.0114
January 1984	4.9920	1.8954
December 1983	5.0659	1.9162
November 1983	5.0550	2.0119
October 1983	4.7022	2.0177
September 1983	4.7325	2.0854

In conformance with the Commission's Order of January 7, 1982 (Statement 4 above) the agreement with Allied also states ...

"It is further provided that either party may elect to replace the price for energy as specified above

with an applicable rate specified by the New York State Public Service Commission either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT". (paragraph FIFTH, page 3).

7. Also, during the negotiation of the energy purchase agreement, Allied requested back-up service in the event of generator failure. This service was arranged under Niagara Mohawk's Service Classification 2 with a minimum Contract Demand of 1500 kilowatts.

8. By letter dated March 20, 1984 to Mr. G.D. Garcy from Mr. Jon M. Tyner, attached as Exhibit A, Allied has requested that it be placed under SC-6 and SC-7. Necessary meter readings were taken on March 26, 1984 to respond to Allied's request. However, if this were done, the differential between existing contractual provisions and payments under SC-6 and SC-7, using 1983 billing parameters, would be:

	Payment to Allied	Payment to Niagara
SC-6 and SC-7	$2,038,705.65	$ 3,366.84
Present Contract	1,263,498.34	103,036.46
Difference	$ 775,207.31	$-(99,669.62)

Purchase Power	$775,207.31
Backup Service	99,669.62
Difference in favor of Allied	$874,876.93

9. As also indicated in a letter dated March 19, 1984, attached as Exhibit B from Allied's Mr. Jon Tyner, Allied is deemed to be a qualifying facility meeting the criteria set forth in 18 CFR Section 292.203. Niagara Mohawk has been purchasing electricity from Allied production at this facility since inception of the contract.

10. Upon information and belief, said Allied facility contains several units which produce steam and electricity. The oldest operating unit contains a boiler which was completed in 1942 and the newest unit contains a boiler which was completed in 1965.

11. Niagara Mohawk currently has in

effect 18 long term agreements with owners of "qualifying facilities" containing "old capacity". Of these, 9 have an option to elect payment at the tariff rate, pursuant to the Commission's Order. Exercise of these options by these other qualifying facilities would significantly increase the payments Niagara Mohawk would have to make under these contracts.

12. Niagara Mohawk hereby petitions the Commission for a declaratory ruling indicating whether Niagara Mohawk's current tariff SC-6, incorporating payment at full-avoided cost, is the tariff envisioned for use in the Commission's order of January 7, 1981 as payment for energy purchased from a facility, like Allied's, on which construction has begun prior to November 9, 1978. If it is not, under what criteria should the Company pay for such electricity purchased from Allied on a particular basis and, on a general basis, other similarly situated facilities?

13. Niagara Mohawk believes that a

sufficient payment to "qualifying facilities" with "old capacity" would equate to payment for "avoided energy costs" only rather than full avoided costs. Further, Niagara Mohawk believes that such payment for "avoided energy" should be in accordance with the formula currently used for payment to Allied. (see paragraph 6 above).

For all the foregoing reasons, Niagara Mohawk requests a declaratory ruling from the Commission providing specific direction whether the Company must pay Allied a price or rate based upon Niagara Mohawk's avoided costs as provided in its SC-6 or at some lesser price or rate determined by the Commission as provided in 18 CFR Section 292.304(b)(3). Niagara Mohawk also requests that the Commission issue a declaratory ruling as to what general criteria Niagara Mohawk should apply, if any, to persons who own qualifying facilities the construction of which commenced prior to November 9, 1978 in determining what price or rate should be paid for electricity

sold to Niagara Mohawk from such facilities or whether such matters should be handled on a case-by-case basis pursuant to Case 17824. Third, should the back-up service to Allied be provided as is currently done under SC-2 or whether such service should now be provided under SC-7.

NIAGARA MOHAWK POWER CORPORATION

By: /s/
Thomas J. O'Neill
System Attorney

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

THOMAS J. O'NEILL, being duly sworn, deposes and says that he is System Attorney of NIAGARA MOHAWK POWER CORPORATION, the corporation on whose behalf he executed the foregoing petition; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge or upon information and belief and as to those matters he believes it to be true.

/s/
Thomas J. O'Neill
System Attorney

Sworn to before me this
5th day of April, 1984.

/s/
Deborah Jean Polichemi
Notary Public

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of the Petition of

NIAGARA MOHAWK POWER CORPORATION

for a declaratory ruling from the New York State Service Commission pursuant to Sections 20 and 66 of the Public Service Law and Section 204 of the State Administrative Procedures Act; for a determination as to whether avoided cost is the appropriate price to be paid to qualifying facilities as that term is utilized in the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. §2601 et seq. and Section 66-c of the Public Service Law of the State of New York;

for such facilities for which construction has commenced prior to November 9, 1978 ("old capacity")

Case No. 27824

TO: THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK:

Allied Chemical (Allied), an operating unit of Allied Corporation, hereby files its counterpetition to Niagara Mohawk Power Corporation's (Niagara Mohawk) petition for a declaratory ruling on Niagara Mohawk's

obligation to make payment to Allied under Service Classification 6 of PSC No. 207 Electricity for electricity purchased from qualifying facilities, construction of which commenced prior to November 9, 1978 ("old capacity") and sell back-up service to Allied under Service Classification 7 of PSC No. 207 Electricity. Allied hereby requests that the New York State Public Service Commission (Commission) issue a declaratory ruling reaffirming its policy that all qualifying facilities in New York State are entitled to payment of full avoided costs.

In support of this counterpetition, Allied respectfully alleges as follows:

1. Allied owns and operates an electric generating station and cogeneration facility, located in the Town of Geddes, New York.

2. Allied and Niagara Mohawk originally entered into a contract for the purchase by Niagara Mohawk of excess power produced at Allied's cogeneration facility on

October 1, 1981. A copy of the contract is annexed hereto and made a part hereof as Exhibit "A". The contract provides that either party may elect to replace the contract price by a filed tariff rate. An additional contract was signed on November 1, 1981 for back-up service to Allied.

3. On March 20, 1984, Allied requested that the rate for purchases by Niagara Mohawk and the rate for back-up service by set pursuant to Niagara Mohawk's filed tariff No. 207, Service Classifications 6 and 7. Allied made such election under the express terms of the contract.

4. Niagara Mohawk rejected Allied's request by a letter to Allied dated April 18, 1984 and the petition to the Commission dated April 5, 1984 to which Allied now responds.

5. The October 1, 1981 agreement between Niagara Mohawk and Allied states:

> It is further provided that either party may elect to replace the price for energy as specified above with an applicable rate specified by the New York State Public Service Commission

> either in a general tariff approved by the Commission or upon petition by either party to this AGREEMENT. (Exhibit "A", p. 3)

6. This clause, which clearly gives Allied the right of election which it has exercised, was included in the contract in accordance with the terms of the January 7, 1981 Commission Order issued in Case 27824. The order required Niagara Mohawk to include an election provision in any contract for cogenerated power. The Order expressly noted the uncertainty to which suppliers were exposed by entering into long-term contracts in advance of the establishment of buy-back rates. The order states:

> Because we are implementing the Section 210 regulations on a utility-by-utility basis there will be some time before a determination regarding a buy-back rate is made for every utility in the state. In the interim, a qualifying facility may wish to sell electricity to utilities but may be reluctant to enter into a long-term contract if the utility is offering a price the qualifying facility believes is below the level we shall ultimately set. To advance the purposes of Section 210, accordingly, we shall require that contracts entered into after today for the sale of energy or

> capacity by a qualifying facility to a utility allow the qualifying facility the option, which may be exercised after we have set a buy-back rate for the utility pursuant to Section 292.304 of the FERC's rules, to change the contract price to that buy-back rate.* [footnote omitted] (Order, p.6)

7. A refusal to pay full avoided cost to all cogenerators would have a chilling effect on the amount of cogeneration capacity which is made available. Allied expended over a million dollars to connect its capacity to the Niagara Mohawk system and expects to made additional capital investments and to incur additional expense in connection with these facilities. Such capital expenditures and expenses are most fairly recovered through the payment of full avoided costs to Allied.

8. The filed tariff SC6, by its own terms, is the "applicable rate". The sole criterion in the tariff is that the customer operate a qualifying facility. Niagara Mohawk concedes in its Petition that Allied owns a qualifying facility (Petition, ¶ 11, 13).

9. Niagara Mohawk is required to pay

the full avoided cost for old capacity under the Public Utility Regulatory Policies Act, 16 U.S.C. 824 et seq. (PURPA), and the implementation of PURPA in New York State. PURPA directed the Federal Energy Regulatory Commission (FERC) to promulgate regulations establishing the price for the cogenerated power encouraged by that statute. FERC established that cogenerated power should receive a rate which is just and reasonable, 18 C.F.R., Part 292. This standard is deemed to require that new capacity be purchased at the full avoided cost of the utility. 18 C.F.R. 292.304(b)(2). Although the FERC regulations do not definitely set the rates for old capacity, Section 292.304(b)(3) requires

> A rate for purchases (other than from new capacity) may be less than the avoided cost if the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or the nonregulated electric utility determines that a lower rate is consistent with paragraph (a) of this section [just and reasonable], and is sufficient to encourage cogeneration and small power production.

The Commission has not set the rate to be paid to "other than new capacity" at less than avoided cost, and, thus, there is no legal basis for the position which Niagara Mohawk has taken in this matter.

10. In Opinion 82-10, Consolidated Edison Company of New York, Inc., Case 27574, the Commission adopted the full avoided cost standard "as the basis for the rates paid to on-site generators authorized by Federal law to sell power to utilities." The Commission held that this standard best comports with its ratemaking policies. The Commission did not set the rate to be paid to "other than new capacity" at less than avoided cost in Case 27574, nor at any later time. Opinion 82-10 supports Allied's position that it is eligible for service pursuant to the full avoided cost tariff.

11. New York State's energy policy clearly encourages cogeneration. New York State's Draft Energy Master Plan seeks to promote and encourage the economic development

of renewable and indigenous energy resources (among which the New York State Energy Office includes cogeneration) as a cost effective way to diversify the State's energy supplies. Vol. 1, New York State Energy Master Plan and Long Range Electric and Gas Report 15 (Draft Report, August 1983). It would be anomalous for the New York State Public Service Commission to sanction a pricing policy which discourages cogeneration and is inconsistent with New York State policy of decentralizing the sources of electric capacity.

12. The price differentials set forth in paragraph 8 of Niagara Mohawk's petition vividly show the extent to which Allied is harmed if the contract rate, and not the filed tariff rate, continues to be used.

WHEREFORE, for the foregoing reasons, Allied requests a declaratory ruling from the Commission requiring Niagara Mohawk to purchase power from Allied's cogeneration facility at the filed rate of SC 6, PSC 207 Electricity and sell back-up service to Allied under SC-7.

ALLIED CORPORATION
By:

/s/

Algird F. White, Jr.
LAW OFFICES OF
ALGIRD F. WHITE, JR.
One Steuben Place
Box 314
Albany, New York 12201
Tel. (518) 434-1161

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ALGIRD F. WHITE, JR., being duly sworn, deposes and says that he is the attorney for Allied Corporation, that he has read the foregoing counterpetition and knows the content thereof, and that the same is true of his own knowledge or upon information and belief and as to those matters he believes it to be true.

/s/
Algird F. White, Jr.

Sworn to before me this
19th day of June, 1984.

/s/
Ruth Anne McGlew
Notary Public